

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARITA HERNANDEZ, individually
and as executor of the Estate of RICARDO
HERNANDEZ,

Plaintiff,

V.

FEDERAL WAY, BLAKE LOSVAR,
TANNER PAU AND SEVERAL JOHN AND
JANE DOE OFFICERS,

Defendants.

Case No. 2:18-CV-01473-BJR

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

18 In the evening hours of October 8, 2016, Ricardo Hernandez (“Ricardo”) was shot and
19 killed by two Federal Way Police Officers. The shooting occurred after a brief standoff at the
20 home where Ricardo lived with his mother, stepfather, and two brothers. Plaintiff, Ricardo’s
21 mother, initiated this action against the City of Federal Way and the officers involved in the
22 shooting (collectively “Defendants”), alleging claims under both federal and Washington law.
23 Currently before the Court is Defendants’ motion for summary judgment, Plaintiff’s opposition

1 thereto, and Defendants' reply in support of the motion. Dkt. Nos. 30, 48, 55. Having reviewed
2 the parties' submissions, the record of the case, and the relevant legal authority, the Court will
3 GRANT the motion.

4 **II. FACTUAL BACKGROUND**

5 On October 8, 2016 at approximately 5:35 in the evening, 911 emergency services received
6 a phone call from Ricardo's mother, Margarita Hernandez, at the Camelot Square Trailer Park in
7 Federal Way, Washington. Dkt. No. 31-2. She was frantic and requested that the police "[p]lease
8 . . . come to my house . . . right now." *Id.* at 1. There was a lot of background noise, including
9 screaming, and the 911 operator had a difficult time understanding Ms. Hernandez. *Id.* After a
10 few seconds, Ms. Hernandez handed the phone to her son, Joel, who reported that his brother,
11 Ricardo, had four knives that were "about a foot" long and that Ricardo was "trying to kill us right
12 now." *Id.* at 1, 6. Joel pleaded with the 911 operator to send police officers to their home: "He
13 keeps throwing (unreadable) . . . destroying the house. He's destroying the house . . . Please he's
14 trying to kill us." *Id.* at 4. Joel informed the operator that he, Ms. Hernandez, his stepfather, and
15 his other brother were barricaded in a room, but that Ricardo was "right outside the door" and
16 "he's going to break the door." *Id.* at 6.

17 Federal Way Police Officers Blake Losvar, Tanner Pau, Chase Smith, and Lieutenant
18 Brigham Schulz were dispatched to the family's residence to respond to a "domestic [dispute] with
19 a knife" at approximately 5:40 PM. Dkt. No. 31-4 at 2. The dispatch report notified the police
20 officers that Joel claimed that Ricardo had "mental health issues." *Id.* at 2.

21 Officer Losvar was the first to arrive at the scene, followed shortly after by Officer Pau at
22 approximately 5:45 PM. Dkt. Nos. 32-2 at 4; 36-1 at 4. Officers Losvar and Pau testified that
23 they could see a man, woman, and two boys through what appeared to be a bedroom window in

1 the trailer home and that the individuals “appeared to be extremely scared”, “frozen in fear”, and
2 “were speaking in soft voices.” Dkt. Nos. 32-2 at 5; 36-1 at 5. Officers Losvar and Pau were able
3 to evacuate Ms. Hernandez, Joel, and his brother out the bedroom window, but Mr. Zambrano,
4 who had barricaded himself against the door of the bedroom, hesitated to leave his position because
5 he was afraid that Ricardo would enter and harm him before he could make it out the window.
6 Dkt. No. 40-1 at 10:14–25. Officer Losvar later testified that he also feared that Ricardo would
7 injure or kill Mr. Zambrano if he successfully breached the door. Dkt. No. 32-2 at 5.

8 Officer Losvar testified that during this time he looked through a different window in the
9 trailer and he saw Ricardo standing “approximately 10 feet from me” and “hold[ing] multiple
10 knives” in his hands. Dkt. No. 32-2 at 5. Officer Losvar claims that he made eye contact with
11 Ricardo, identified himself as a police officer, and ordered Ricardo to put down the knives. *Id.*
12 He alleges that Ricardo did not comply with his instructions, but instead moved toward the other
13 side of the trailer. *Id.* at 5–6.

14 Officer Pau testified that he was able to safely evacuate Mr. Zambrano from the bedroom
15 window and that he and Officer Losvar then escorted the family to a nearby shed. *Id.* at 6. There
16 is a dispute as to whether the family could see the scene at the trailer unfold from where they were
17 standing by the shed. Mr. Zambrano testified that he could see “everything” from his vantage
18 point (Dkt. No. 51-4 at 5) while Officer Losvar claims that the family could no longer see the
19 trailer from where they were standing (Dkt. No. 32-2 at 6). Officer Losvar testified that, at this
20 time, one of the family members told him that Ricardo had threatened to stab and kill the family.
21 Dkt. No. 32-2 at 6. In light of this and his own observations, Officer Losvar determined that he
22 had probable cause to arrest Ricardo for felony harassment and broadcast the same over his police
23

1 radio. *Id.* He also asked for additional officers to join him at his location and requested that an
2 officer respond to the scene with a less lethal 40 mm shotgun. *Id.*

3 Corporal Riggles and Officers Chase Smith, Shawn Warrick, and others arrived on the
4 scene and established a perimeter around the trailer home. Dkt. Nos. 30 at 5-6:7, 18; 32-2 at 6.
5 Meanwhile, Officer Pau moved to the rear of the trailer home where he positioned himself in the
6 “small backyard area, at the northeast corner of the trailer.” Dkt. No. 36-1 at 5. Officer Pau claimed
7 that from his position, he had “a clear unobstructed view of the backdoor of the trailer,” which was
8 elevated above the ground “by a wooden landing area just outside the door” that had 2-3 steps
9 leading down to the ground level. *Id.* Officer Pau testified that the backdoor of the trailer was
10 “approximately fifteen to twenty feet from” where he was standing. *Id.* This is another area of
11 dispute. Plaintiff alleges that Officer Pau was more than 21 feet from the backdoor. Dkt. No. 48
12 at 3:9-11.

13 Officer Pau testified that Ricardo opened the backdoor and yelled, ““Fuck you! Kill me!””
14 Dkt. No. 36-1 at 5. Officer Pau claimed that Ricardo opened and closed the door a few more times
15 and, at that point, Officer Pau became “concerned for [his] personal safety as [he] was unable to
16 make constant visual contact with Ricardo, did not know whether [Ricardo] had additional
17 weapons, [Ricardo] continued to act in an aggressive and angry manner, and [Officer Pau] did not
18 know if the trailer was clear of all other occupants.” *Id.* at 6. In addition, Officer Pau was aware
19 that Officer Losvar had determined that probable cause existed to arrest Ricardo for felony
20 harassment. *Id.* at 5. Officer Pau request that another police officer join him in the backyard
21 behind the trailer and Officer Losvar joined him. *Id.* at 6. Both officers testified that they
22 continued to advise Ricardo that he was under arrest and to slowly exit the residence unarmed.
23 Dkt. Nos. 32-2 at 6; 36-1 at 6.

1 Officers Losvar and Pau alleged that Ricardo continued to partly open and close the
2 backdoor in an agitated manner, shouting at the officers to kill him. Dkt. Nos. 32-2 at 6; 36-1 at
3 6. This continued for another few minutes until, the officers allege, Ricardo opened the door and
4 stepped onto the wooden landing toward the stairs leading down to the ground level. *Id.* Officers
5 Losvar and Pau both testified that Ricardo was holding a large kitchen knife in one hand and two
6 more knives in his other hand. *Id.* Officer Pau testified that at that point he “became concerned
7 that Ricardo now posed a direct threat of serious physical injury to Officer Losvar or [him]self.”
8 Dkt. No. 36-1 at 6. He testified that he felt Ricardo posed a serious threat to them because “[1]
9 the distance between us would easily be covered by a simple jump from the [wooden landing], [2]
10 Ricardo was armed with multiple weapons, [3] he recognized us as law enforcement, [4] he was
11 agitated and angry, and [5] refused to response to commands.” *Id.*

12 The officers reported that Ricardo continued to yell “just fucking kill me!” and then he
13 “abruptly stepped forward as if he was about to come at [the officers], while raising the knives
14 from his sides to about his abdomen level in [the officers’] direction.” Dkt. No. 36-1 at 6; *see also*
15 Dkt. No. 32-2 at 6 (stating that Ricardo “looked directly at [the officers] with a piercing stare and
16 [] started to advance toward [them] in an aggressive fashion.”). Both Officer Losvar and Officer
17 Pau testified that they believed Ricardo was about to attack them and, as such, they fired their guns
18 simultaneously. Dkt. Nos. 32-2 at 7; 36-1 at 6. They collectively fired nine rounds, six of which
19 struck Ricardo in the head, shoulder, and chest. Dkt. No. 40-17 at 18:8–18. The officers testified
20 that when the rounds struck Ricardo, he fell backwards into the trailer’s doorway, dropped the
21 knives, and landed on his back. Dkt. Nos. 32-2 at 7; 36-1 at 6. Officer Losvar recalled seeing
22 “knives laying on the deck” after Ricardo was shot. Dkt. 32-2 at 7. He then radioed for medics
23 who pronounced Ricardo deceased at the scene when they arrived. *Id.*; Dkt. No. 51-7 at 3.

III. LEGAL STANDARD

2 Rule 56 provides that a district court “shall grant summary judgment if the movant shows
3 that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
4 matter of law.” FED. R. CIV. P. 56(a); *Fed. Home Loan Mortg. Corp. v. SFR Investments Pool 1,*
5 *LLC*, 893 F.3d 1136, 1144 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1618 (2019). Disputes over
6 facts become “material” only where they “might affect the outcome of the suit under governing
7 law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As such, “materiality is based
8 on the substantive law at issue.” *Id.* A “genuine dispute of material facts,” occurs where the
9 “evidence is such that a reasonable [finder of fact] could return a verdict for the nonmoving party.”
10 *Id.* The moving party bears the “initial responsibility of informing the district court of the basis
11 for its motion,” including “identifying those portions of the pleadings . . . which it believes
12 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S.
13 317, 323 (1986) (internal citations omitted). In meeting this burden, the nonmoving party must go
14 beyond the pleadings and show “by her own affidavits, or by the depositions, answers to
15 interrogatories, or admissions on file” that a genuine issue of material fact exists. *Hopkins v.*
16 *Andaya*, 958 F.2d 881, 885 (9th Cir. 1992) (citing *Celotex Corp.*, 477 U.S. 317 at 324). Further,
17 “[w]here the moving party will have the burden of proof on an issue at trial, the movant must
18 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving
19 party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

20 Where the moving party has met its initial burden, the nonmovant must respond by showing
21 that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. “If the nonmoving party fails to
22 establish the existence of a genuine issue of material fact, ‘the moving party is entitled to judgment
23 as a matter of law.’” *Perfect Co. v. Adaptics Ltd.*, 374 F. Supp. 3d 1039, 1041 (W.D. Wash. 2019)

1 (quoting *Celotex Corp.*, 477 U.S. at 323–24). In conducting its evaluation of the merits of a motion
 2 for summary judgment, “the court does not make credibility determinations or weigh conflicting
 3 evidence.” *Soremekun*, 509 F.3d at 984. Instead, the Court must “view ‘the evidence in the light
 4 most favorable to the nonmoving party.’” *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*,
 5 929 F.3d 1143 (9th Cir. 2019) (quoting *Pension Tr. Fund for Operating Eng’rs v. Fed. Ins. Co.*,
 6 307 F.3d 944, 949 (9th Cir. 2002)).

7 IV. DISCUSSION

8 Plaintiff brings six claims against Defendants. Dkt. No. 19. Two federal claims pursuant
 9 to 42 U.S.C. § 1983, alleging that Defendants violated Ricardo’s Fourth Amendment right to be
 10 free from unlawful seizure and the use of excessive force and that Defendants violated her
 11 Fourteenth Amendment right to the companionship of her son, as well as four state claims, alleging
 12 assault, negligence, outrage, and discrimination under Washington law. *Id.*

13 Defendants move for summary judgment on each of Plaintiff’s claims. Dkt. No. 30. With
 14 respect to the two § 1983 claims, they argue that the undisputed material facts establish that
 15 Officers Losvar and Pau had probable cause to arrest Ricardo and to use deadly force in response
 16 to the imminent threat he presented. *Id.* at 16–23. They further argue that the undisputed material
 17 facts establish that Defendants did not wrongfully deprive Plaintiff of her parent-child relationship
 18 with Ricardo. *Id.* at 23. Alternatively, Defendants contend that the officers are entitled to federal
 19 qualified immunity on these claims.¹ *Id.* at 23–24. Defendants also move to dismiss each of

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 21
 22 ¹ Defendants contend that Plaintiff also attempted to bring a *Monell* claim against the City of Federal Way and moves
 23 for summary judgment on that claim as well. Dkt. No. 30 at 24–26. The Court has reviewed the Amended Complaint
 and finds that Plaintiff failed to allege the requisite elements of a *Monell* claim. *See* Dkt. No. 19. Moreover, she
 entirely fails to address Defendants’ argument with respect to this claim in her opposition to the summary judgment
 motion. Therefore, the Court concludes that to the extent Plaintiff alleges a *Monell* claim in the amended complaint,
 she has conceded the issue and the claim is dismissed.

1 Plaintiff's state claims, arguing that the claims are not factually or legally supported, and that
2 Defendants are immune from such claims. *Id.* at 26–31.

3 The Court will address each of Plaintiff's claims in turn.

4 **A. The Federal Claims**

5 As stated above, Plaintiff brings two federal claims pursuant to 42 U.S.C. § 1983. Dkt.
6 No. 19. First, she alleges that Defendants violated Ricardo's Fourth Amendment right to be free
7 from unreasonable seizure and use of excessive force. Second, she alleges that Defendants violated
8 her Fourteenth Amendment liberty interest in the companionship and society of her child (*i.e.*,
9 Ricardo). In order to succeed on her § 1983 claims, Plaintiff must establish that: (1) Defendants
10 were acting under the color of state law when they committed the conduct complained of; and (2)
11 that conduct deprived Ricardo and/or Plaintiff of a right, privilege, or immunity secured by the
12 U.S. Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).
13 Here, there is no dispute that Defendants acted under the color of state law when they shot Ricardo.
14 Thus, the Court's analysis of Plaintiff's § 1983 claims focuses on whether Defendants violated
15 Ricardo's and/or Plaintiff's constitutional rights.

16 **1. The Fourth Amendment Claim: Unreasonable Seizure and Use
17 of Excessive Force**

18 Plaintiff argues that Officers Losvar and Pau violated Ricardo's Fourth Amendment right
19 to be free from unreasonable seizure and the use of excessive force. Dkt. No. 19 at 11.
20 Specifically, she alleges that (1) the officers did not have probable cause to arrest (*i.e.*, seize)
21 Ricardo; and that (2) they used excessive force when they shot him. *Id.*

22 **a. Unreasonable Seizure**

23 It is blackletter law that the Fourth Amendment prohibits arrests without probable cause.
Beck v. Ohio, 379 U.S. 89, 90–91 (1964). Probable cause exists if the totality of the circumstances

1 within an officer's knowledge would cause a reasonably prudent officer to believe that a crime has
2 been, or is currently, being committed. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (9th
3 Cir. 2009). The "factual matters underlying the judgment of reasonableness" are generally a
4 "question for the jury." *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984); *see Thomas v.*
5 *Cannon*, No. 3:15-05346, 2017 WL 2289081, at *8 (W.D. Wash. May 25, 2017).

6 Ms. Hernandez alleges that significant questions of material fact exist as to whether
7 Officers Losvar and Pau had probable cause to arrest Ricardo on the night of the shooting and
8 therefore, she argues, summary judgment on this issue is inappropriate. Dkt. No. 48 at 10–13.
9 Defendants counter that summary judgment is warranted because there are no material facts in
10 dispute as to whether the officers had probable cause to arrest Ricardo for felony harassment. Dkt.
11 No. 30 at 16–17. They point to the following, undisputed evidence: (1) Officers Losvar and Pau
12 received the dispatcher's report in which Joel claimed that Ricardo had knives and was trying to
13 kill them; (2) upon arriving at the scene, Officers Losvar and Pau observed the family barricaded
14 in room with Mr. Zambrano holding the door shut to prevent someone from entering the room; (3)
15 Mr. Zambrano hesitated to leave his position at the door because he was afraid that Ricardo would
16 enter and harm him before he could make it out the window; and (4) Officer Losvar observed
17 Ricardo through one of the trailer windows holding multiple knives. *Id.* at 17.

18 Officer Losvar also testified that after evacuating the family to safety, one of the family
19 members told him that Ricardo had threatened to kill them that evening. Dkt. No. 32-2 at 6.
20 Plaintiff adamantly disputes that this conversation occurred; as such, the Court disregards this
21 testimony from Officer Losvar. Dkt. No. 48 at 3:1–2. Nevertheless, even without this testimony,
22 the Court concludes that the remaining undisputed evidence overwhelmingly supports Officer
23 Losvar's belief that Ricardo "had committed or was committing an offense" such that probable

1 cause existed for his arrest. *Beck*, 379 U.S. at 90–91. Although the issue of probable cause is
2 usually reserved for a jury, in light of the undisputed evidence presented, this Court concludes that
3 no reasonable jury could find for Plaintiff on this issue and, thus, summary judgment is warranted.

4 In reaching this conclusion, the Court finds the Ninth Circuit’s decision in *Lassiter v. City*
5 *of Bremerton* illustrative. 556 F.3d 1049 (9th Cir. 2009). In *Lassiter*, a married couple brought a
6 42 U.S.C. § 1983 action against the city and its responding officers who arrested the husband
7 following a neighbor’s 911 call about a possible domestic disturbance. *Lassiter*, 556 F.3d at 1053–
8 1054. When the officers entered the home, the husband attempted to impede their ability to get
9 the wife to safety and would not obey the officer’s command to sit down. *Id.* at 1053. The couple
10 later sued the officers, alleging that they had entered their residence without a warrant and arrested
11 the husband without probable cause, in violation of their Fourth Amendment rights. *Id.* The
12 officers moved for summary judgement, which the district court granted. *Id.* at 1054. The
13 plaintiffs appealed, arguing that summary judgment was not appropriate because disputes of
14 material fact existed. *Id.* at 1053. The Ninth Circuit acknowledged the existence of factual
15 disputes in the record but agreed with the district court that there were sufficient material facts that
16 were not in dispute to allow the district court to conclude that the officers had probable cause to
17 arrest the husband. *Id.* Likewise, in the case before this Court, while some of the factual
18 allegations are in dispute (e.g., whether a family member told Officer Losvar that Ricardo had
19 threatened to kill them), these disputes are not material in light of the other undisputed evidence
20 that establishes that Officer Losvar had probable cause to arrest Ricardo for felony harassment.

b. Excessive Force

22 Plaintiff next argues that Officers Losvar and Pau violated Ricardo's Fourth Amendment
23 right to be free from excessive force. Dkt. Nos. 19 at 11; 48 at 11–22. Claims of excessive force

1 are examined under the Fourth Amendment’s reasonableness standard, which requires that police
2 officers making an arrest use only the amount of force that is objectively reasonable in light of the
3 circumstances facing them. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). As the Supreme
4 Court explained in *Graham*, “the ‘reasonableness’ inquiry is an objective one: the question is
5 whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances
6 confronting them, without regard to their underlying intent or motivation.” 490 U.S. at 387. The
7 “calculus of reasonableness must embody allowance for the fact that police officers are often
8 forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly
9 evolving—about the amount of force that is necessary in a particular situation.” *Kisela v. Hughes*,
10 138 S. Ct. 1148, 1152 (2018) (quoting *Graham*, 409 U.S. at 396–397).

11 Under *Graham*, three factors must be considered in assessing the reasonableness of the
12 force used: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat
13 to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting
14 to evade arrest by flight. *See Smith v. City of Hemet*, 394 F.3d 698, 701 (9th Cir. 2005) (citing
15 *Graham*, 490 U.S. at 396). Whether the suspect poses a threat to the safety of officers or others is
16 “the most important single element of the three specified factors.” *Chew v. Gates*, 27 F.3d 1432,
17 1441 (9th Cir. 1994).

18 The Court finds that the first factor—the severity of the crime at issue—is easily satisfied.
19 As this Court has already concluded, Officer Losvar had probable cause to arrest Ricardo for felony
20 harassment because he was threatening to kill his family. Although the family now adamantly
21 disputes that Ricardo was threatening them, their allegation is contradicted by the 911 call
22 transcript in which both Plaintiff and Joel pled for help, the fact that Officers Losvar and Pau found
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1 the family barricaded in the bedroom, and the fact that Officers Losvar and Pau witnessed Ricardo
2 brandishing knives. Therefore, the first *Graham* element is satisfied.

3 Next, this Court considers whether Ricardo posed an imminent threat to Officers Losvar
4 and Pau or others, the second *Graham* factor. “In the deadly force context, [the court] cannot
5 ‘simply accept what may be a self-serving account by the police officer.’” *Cruz v. City of Anaheim*,
6 765 F.3d 1076, 1079 (9th Cir. 2014) (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)).
7 “Because the person most likely to rebut the officers’ version of events—the one killed—can’t
8 testify, ‘[t]he judge must carefully examine all the evidence in the record . . . to determine whether
9 the officer’s story is internally consistent and consistent with other known facts.’” *Id.* (quoting
10 *Scott*, 39 F.3d at 915). “This includes ‘circumstantial evidence that, if believed, would tend to
11 discredit the police officer’s story.’” *Id.* (quoting *Scott*, 39 F.3d at 915).

12 Here, Plaintiff challenges the reasonableness of Officer Losvar’s and Officer Pau’s belief
13 that Ricardo posed an imminent threat of serious harm to them or others at the time that they shot
14 him. *See* Dkt. No. 48 at 11–22. She asserts that the “physical evidence contradicts” the officers’
15 claims that Ricardo was approaching them in an aggressive manner. *Id.* at 8. Rather, she argues,
16 Ricardo was “placing the knives on the porch” and attempting to surrender, as instructed, when
17 the officers shot him. Dkt. No. 19 at 4; *see also* Dkt. No. 48 at 20. At a minimum, she argues, a
18 genuine issue of material fact exists on this issue, rendering summary judgment inappropriate.
19 Dkt. No. 48 at 20–22.

20 Plaintiff points to the following evidence in support of her argument. Dkt. No. 48. First,
21 she points out that Corporal Riggles testified that Ricardo did not appear upset when he saw
22 Ricardo right before the shooting. *Id.* at 5:1–12. Plaintiff argues that this testimony directly
23 contradicts Officer Losvar’s and Officer Pau’s testimony that Ricardo was behaving aggressively

1 toward them. *Id.* at 4–5; 8:16–17; 19–20. Next, Plaintiff points out that it is undisputed that
2 Ricardo’s body was face up and in the doorway of the trailer after he was shot. *Id.* at 19–20.
3 Plaintiff argues that this contradicts the officers’ claim that Ricardo was lunging at them when they
4 shot him. *Id.* Plaintiff also points to a police photograph from the scene of the shooting that shows
5 the knives neatly placed in a row on the floor. *Id.* at 7–8. Plaintiff claims that this photograph
6 calls into doubt the officers’ testimony that the knives Ricardo was holding were scattered across
7 the deck after he was shot. *Id.* She also contends that the photograph is evidence that Ricardo had
8 put the knives down (in a neat row) because he was attempting to surrender to Officers Losvar and
9 Pau per their instructions. *Id.* Lastly, Plaintiff cites to report of Kay M. Sweeney, Plaintiff’s
10 forensic expert, in which she opines that Ricardo was “hunched down” at the time he was shot,
11 suggesting that he was not lunging at the officers when he was killed. *Id.* at 7:5–7. The Court will
12 address each of Plaintiff’s arguments in turn.

13 As stated above, Plaintiff argues that Corporal Riggles’ testimony calls into doubt Officer
14 Losvar’s and Officer Pau’s testimony that Ricardo was acting aggressively. Dkt. No. 48 at 5:1–
15 12. Corporal Riggles testified that Ricardo did not “appear upset” at any time that he saw Ricardo
16 that evening. Dkt. Nos. 51-9 at 2; 51-10 at 5 (stating that Ricardo did not “appear very upset”).
17 However, Corporal Riggles also testified that when he saw Ricardo “it appeared he had a knife in
18 both hands” and that he heard Ricardo yell, “I can’t kill myself so you guys are going to have to
19 do it for me.” Dkt. No. 51-9 at 2. Finally, he testified that he saw Ricardo “exit[] outside further
20 onto the small porch” right before Officers Losvar and Pau shot him. *Id.* The Court concludes
21 that rather than contradict Officers Losvar’s and Pau’s testimony, Corporal Riggles’ testimony
22 collaborates their claims that Ricardo was not acting rationally (*i.e.* asking the police to kill him),
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1 that he had several knives in his possession at the time he was shot, and that he was moving towards
 2 Officers Losvar and Pau when they fired their guns at him.²

3 Next, Plaintiff argues that the fact that Ricardo's body was face up and laying in the
 4 doorway of the trailer creates a dispute of fact as to whether he was charging towards Officers
 5 Losvar and Pau when they shot him. Dkt. No. 48 at 7:5–7. Plaintiff claims that if Ricardo had
 6 been lunging towards the officers, he would have fallen forward face-down outside the doorway
 7 after he was shot. *Id.* Plaintiff presents no evidence for her claim that Ricardo would have fallen
 8 face forward when shot if he had been charging at the officers. Instead, she relies on the inquest
 9 testimony of Dr. Brian Mazrim, a forensic pathologist and medical examiner for King County
 10 Medical Examiner's Office, to argue that the bullets could not have "pushed" Ricardo back into
 11 the doorway. *Id.* at 6:14–23, 7:1–2. There are several problems with Plaintiff's argument. First,
 12 Plaintiff failed to authenticate Dr. Mazrim's inquest transcript, so it is inadmissible testimony. *See*
 13 *Commerce W. Ins. Co. v. Lucke*, 342 F. Supp. 3d 1098, 1101 (W.D. Wash. 2018) (citing *Orr v.*
 14 *Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider
 15 admissible evidence in ruling on a motion for summary judgment."). Second, even if Dr. Mazrim's
 16 testimony was admissible, it does not further Plaintiff's claim because Dr. Mazrim specifically
 17 stated that he had no opinion on what Ricardo was doing immediately before he was shot. *See*
 18 Dkt. No. 40–17 at 18:16–17, 20:1–2, 22:2–5. Lastly, Defendants do not claim that Ricardo had
 19 moved significantly away from the doorway when he was shot, rather Officers Losvar and Pau

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 21 ² Defendants move to strike the excepts from the deposition of Corporal Riggles that Plaintiff sites in support of her
 22 opposition to the motion, claiming that they have not been properly authenticated. The Court agrees. The Corporal's
 23 deposition is not properly authenticated as it fails to contain a court reporter certification; therefore, it is inadmissible.
See Commerce W. Ins. Co., 342 F. Supp. at 1101 (citing *Orr*, 285 F.3d at 773) ("A trial court can only consider
 admissible evidence in ruling on a motion for summary judgment."). Thus, even if the Corporal's testimony
 contradicted the Officers' testimony—which it does not—the evidence would be inadmissible for purposes of this
 motion.

1 testified that Ricardo “*started* towards them in an aggressive manner” and then “fell backward into
 2 the doorway that he had just exited, dropping the knives and landing on his back.” Dkt. Nos. 32-
 3 2 at 6; 36-1 at 6 (emphasis added). This testimony is consistent with the crime scene photos that
 4 show Ricardo laying on his back halfway out the doorway.

5 Plaintiff also claims that Officers Losvar’s and Pau’s testimony that they observed knives
 6 “scattered” around Ricardo after he was shot is contradicted by a photograph showing the knives
 7 in a neat row. Dkt. No. 48 at 7–8. Plaintiff argues that the photograph calls into question the
 8 reliability of the officers’ testimony and further establishes that Ricardo had actually placed the
 9 knives down to surrender before he was shot. *Id.* Plaintiff’s theory is based on a photograph that
 10 was taken *after* the incident. *See* Dkt. Nos. 40-6 at 90:1–91:6; 40-15 at 208:2–15, 213:18–215:12;
 11 40-14 at 68:18–69:17 (explaining that the photograph was taken after the shooting and that the
 12 knives were likely lined up by someone at the scene after the shooting). On the other hand, Officer
 13 Losvar’s and Officer Pau’s testimony that they saw Ricardo drop the knives after he was shot is
 14 corroborated by Lieutenant Schultz, Officer Smith, and Corporal Riggles who each testified that
 15 they saw several knives around Ricardo’s body right after the shooting. *See* Dkt. No. 37-1 at 2–3
 16 (Lieutenant Schultz testifying that he saw several knives underneath Ricardo’s body); Dkt. No. 51-
 17 9 at 2 (Corporal Riggles testifying that he found a knife right next to Ricardo’s hand when Officer
 18 Smith rolled Ricardo over onto his stomach to handcuff him); Dkt. No. 40-13 at 8:25–11:4 (Officer
 19 Smith testifying that he saw a knife near Ricardo’s left hand).³

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³ Plaintiff presents testimony from her forensic expert, Kay Sweeney, in which Mr. Sweeney opines that the entry and exit bullet wounds on Ricardo are consistent with him “hunching down” to put the knives on the ground in surrender as opposed to lunging at Officers Losvar and Pau, as they claim. However, this Court previously granted Defendants’ motion to strike Mr. Sweeney’s report as unreliable because his conclusions are based on an incomplete review of the case materials and misstate the evidence. As such, Mr. Sweeney’s testimony is inadmissible here.

1 Although Plaintiff raises factual disputes within the record, the Court finds them immaterial
2 and concludes there is sufficient undisputed evidence to demonstrate that it was objectively
3 reasonable for Officers Losvar and Pau to believe that Ricardo presented an imminent danger to
4 them, thus satisfying the second—and most important—*Graham* factor. In reaching this decision,
5 the Court finds *Watkins v. City of San Jose*, No. 15-cv-05786, 2017 WL 1739159 (N.D. Cal. May
6 4, 2017), *aff'd sub nom. Buchanan v. City of San Jose*, 782 Fed. App'x 589 (9th Cir. 2019) and
7 *Estate of Yanira Serrano v. Trieu*, No. C-14-4081, 2016 WL 1089225 (N.D. Cal. Mar. 21, 2016),
8 *aff'd sub nom. Estate of Serrano v. Trieu*, 713 Fed. App'x 631 (9th Cir. 2018) instructive. Both
9 cases addressed whether the officers' use of force was reasonable in the Fourth Amendment
10 context.

11 *Watkins* involved decedent's family members who brought a 42 U.S.C. § 1983 action
12 against the responding officers who shot and killed the decedent following his 911 call, in which
13 he falsely reported that a man with a knife was threatening to kill his family and that he was locked
14 in a room with his children. *Watkins*, 2017 WL 1739159, at *1. The officers were not aware when
15 dispatched that, earlier that day, the decedent was suicidal because his fiancé had told him that she
16 no longer wanted to marry him. *Id.* at *4–5. Upon arriving on the scene, the officers reported that
17 a man began to walk towards them, carrying a knife at his side with the blade pointing up. *Id.* at
18 *1–2. The officers drew their guns and commanded the decedent to surrender. *Id.* at *2. The man
19 refused to comply with the officers' instructions. *Id.* As the man continued to advance towards
20 the officers, the officers fired their weapons and killed him while he was standing about 55 feet
21 from them. *Id.* at *3. As part of the investigation, there was conflicting testimony as to whether
22 the man had accelerated and lunged towards the officers, the distance between the officers and the
23 man when they fired their weapons, and whether the decedent was attempting to comply with their

1 orders to surrender. *Id.* at *1–6. The plaintiffs sued the officers, alleging, among other things, that
2 the officers had violated the decedent’s Fourth Amendment rights by using excessive force when
3 they shot him. *Id.* at *6. The officers moved for summary judgment and the district court granted
4 the motion. *Id.* The plaintiffs appealed, arguing that the trial court erred because there were
5 material issues in dispute as to whether the officers acted reasonably. *Buchanan*, 782 Fed. App’x
6 589 at 590. The Ninth Circuit disagreed with the plaintiffs, finding that there was ample evidence
7 in the record—even viewed in the light most favorable to the plaintiffs—to demonstrate that the
8 officers used reasonable force when they shot the decedent. *Id.* at 591–593.

9 Similarly, *Estate of Yanira Serrano v. Trieu* involved a police officer who shot a mentally-
10 ill woman after responding to a 911 call that reported that a woman was engaging in erratic
11 behavior with a kitchen knife after failing to take her medication for schizophrenia. *Estate of*
12 *Yanira Serrano v. Trieu*, 2016 WL 1089225, at *1–2. Upon arriving at the scene, the officer saw
13 Ms. Serrano who was holding an eleven-inch knife on the front porch of her residence. *Id.* at *2.
14 When Ms. Serrano saw the officer, she began walking towards him. *Id.* The officer “backpedaled”
15 down the block, away from her and towards his vehicle. *Id.* at *3. Ms. Serrano followed, still
16 holding the knife above her shoulder. *Id.* As the officer ran down the street, he yelled over his
17 shoulder, commanding her to “stop”. *Id.* Ms. Serrano did not comply with that order nor did she
18 lower the knife in her hand; after retreating for approximately 160 feet, the officer finally turned
19 toward Ms. Serrano, this time pointing his firearm at her, and ordered her to “stop”. *Id.* When she
20 did not comply with his order, the officer shot and killed Ms. Serrano. *Id.* Ms. Serrano’s family
21 members filed a 42 U.S.C. § 1983 suit against the officer, alleging (among other things) that he
22 violated Ms. Serrano’s Fourth Amendment rights by using excessive force against her. *Id.* at *4.
23 The officer moved for summary judgment, which the district court granted finding that there were

1 no triable issues as to plaintiffs' claim that the officer's use of deadly force was unreasonable. *Id.*
2 at *5–8. The plaintiff appealed, arguing that the trial court erred because there were material issues
3 in dispute as to whether the officer's use of deadly force was reasonable. *Estate of Serrano*, 713
4 Fed. App'x at 631.

5 On appeal, the Ninth Circuit upheld the district court's grant of summary judgment, finding
6 that the record, viewed in the light most favorable to the plaintiff, was sufficient to demonstrate
7 that the officer acted reasonably when firing his weapon. *Id.* at 632. In reaching its conclusion,
8 the Ninth Circuit determined that the evidence demonstrated that Ms. Serrano had acted
9 aggressively towards the officer while holding a knife, chasing after him, and refusing to comply
10 with his commands. *Id.* The court held that, “[a]t a minimum, summary judgment was proper
11 because the plaintiffs have not pointed to any case that would have placed [the officer] on ‘fair
12 notice’ that the use of deadly force was unconstitutional under the circumstances of this case.” *Id.*
13 (quoting *Glenn v. Washington County*, 673 F.3d 864, 876 (9th Cir. 2011) (“Officers ‘need not avail
14 themselves of the least intrusive means of responding to an exigent situation; they need only act
15 within that range of conduct we identify as reasonable.’”); quoting *Smith v. City of Hemet*, 394
16 F.3d 689, 704 (9th Cir. 2005) (en banc) (“[W]here a suspect threatens an officer with a weapon
17 such as a gun or a knife, the officer is justified in using deadly force.”)).

18 Similarly here, the Court finds that there exists no triable issues as to whether it was
19 objectively reasonable for Officers Losvar and Pau to believe that Ricardo presented an imminent
20 danger to them. Like the facts and holdings in *Buchanan* and *Estate of Yanira Serrano*, Ricardo
21 appeared to be advancing towards the officers while holding a knife and refusing to comply with
22 Officers Losvar and Pau's commands. Irrespective of the distance between them, the officers
23 thought Ricardo was an “immediate threat” and were “justified their use of deadly force.”

1 *Buchanan*, 782 Fed. App'x 589 at 591; *see also Lal v. California*, 746 F.3d 1112, 1118–19 (9th
2 Cir. 2014) (holding that officers' use of deadly force was reasonable when suspect had ignored the
3 officers' commands, had previously shown his intent to injure others, and had charged at the
4 officers with a rock over his head).

5 The Court also concludes that the final *Graham* factor—whether Ricardo was resisting
6 arrest—is satisfied. As stated above, Plaintiff contends that Ricardo was attempting to surrender
7 when he was shot. Dkt. No. 48 at 7–8. However, Plaintiff has presented no reliable evidence to
8 support her claim and instead, all of the evidence in the record, direct or circumstantial,
9 demonstrates that Ricardo refused to comply with Officer Losvar's and Officer Pau's orders to
10 surrender.

11 Plaintiff relies extensively on a recent Ninth Circuit case, *Cruz v. City of Anaheim*, to argue
12 that Officers Losvar and Pau used excessive force when they shot and killed Ricardo. Dkt. No. 48
13 at 13–16; 19–21 (citing *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014)). In *Cruz*, Anaheim
14 police officers shot the decedent during a felony traffic stop, claiming they believed he was
15 reaching for a gun from his waistband. 765 F.3d at 1077–78. Relatives of the decedent brought
16 suit against the city and its officers, alleging among other claims, that the officers used excessive
17 force when they shot the decedent. *Id.* at 1077–78. The trial court granted summary judgment in
18 favor of the officers and the relatives appealed. *Id.* at 1076–78. The Ninth Circuit reversed stating
19 that the discrepancies between the officers' version of events and the physical evidence and
20 eyewitness testimony could “give a reasonable jury pause.” *Id.* at 1079. In *Cruz*, there was
21 testimony from an eyewitness that the decedent appeared to be slipping and falling as he exited his
22 car, just before police shot him. *Id.* at 1080. This conflicted with the officers' accounts that the
23 decedent had “fully emerged from his SUV and was poised to attack.” *Id.* The officers also

1 claimed that the decedent had exited the vehicle and was standing in the doorway, but then testified
2 they had to cut him from his seatbelt after the shooting. *Id.* In addition, the decedent was left-
3 handed, but the officers stated he drew for his gun with his right hand. *Id.* Lastly, no weapon was
4 found on the decedent after he was shot. *Id.* at 1078–79.

5 Plaintiff's reliance on *Cruz* is misplaced. The facts of that case are readily distinguishable
6 from the instant case. First, here, unlike in *Cruz*, there is no eyewitness testimony that conflicts
7 with Officer Losvar's and Officer Pau's claim that Ricardo refused to comply with their
8 instructions to surrender. Second, unlike in *Cruz*, Officer Losvar's and Officer Pau's testimony is
9 internally consistent. Lastly, while the decedent in *Cruz* was unarmed, Ricardo had several knives
10 in his possession at the time of the shooting. Simply put, there are no discrepancies between
11 Officer Losvar's and Officer Pau's version of events and the physical evidence and eyewitness
12 testimony in this case that could "give a reasonable jury pause" that the officers used objectively
13 lawful force in response to Ricardo's actions. *Id.* at 1079.

14 Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's Fourth
15 Amendment claims.

16 **2. Fourteenth Amendment Claim: Deprivation of Familial Relationship**

17 A parent has a constitutionally protected liberty interest under the Fourteenth Amendment
18 in the companionship and society of her child. *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325
19 (9th Cir. 1991). Therefore, if a parent loses companionship with a child through an officer's
20 excessive use of force, the parent may bring a claim under the Fourteenth Amendment. *Id.* To
21 establish such a claim, the plaintiff must prove that the officer's action "shocks the conscience."
22 *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1230 (9th Cir. 2013). This standard differs from the
23 excessive force standard under the Fourth Amendment. *Hayes*, 736 F.3d 1223 at 1230. "In

1 determining whether excessive force shocks the conscience, the court must first ask ‘whether the
2 circumstances are such that actual deliberation [by the officer] is practical.’” *Id.* (quoting *Porter*
3 *v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). “Where actual deliberation is practical, then an
4 officer’s ‘deliberate indifference’ may suffice to shock the conscience. On the other hand, where
5 a law enforcement officer makes a snap judgment because of an escalating situation, his conduct
6 may be found to shock the conscience only if he acts with a purpose to harm unrelated to legitimate
7 law enforcement objectives.” *Id.* “Whether an official had the requisite knowledge is a question
8 of fact subject to demonstration in the usual ways, and a factfinder may conclude that the official
9 knew of a substantial risk from the very fact that it was obvious.” *Farmer v. Brennan*, 511 U.S.
10 825, 826 (1994).

11 Here, Ms. Hernandez brings a claim for the deprivation of her familial relationship with
12 Ricardo. Dkt. No. 19 at 11:16–21. Defendants argue that summary judgment is warranted with
13 respect to Plaintiff’s Fourteenth Amendment claim because there are no material facts in dispute
14 that Officers Losvar and Pau “used reasonable force under the Fourth Amendment.” Dkt. No. 30
15 at 23:6–12. Plaintiff fails to even address this issue in her opposition to the summary judgment
16 motion.

17 As the Court has already established, the officers did not use excessive force when shooting
18 Ricardo and their actions were reasonable; therefore, *a fortiori*, their conduct does not shock the
19 conscious. Accordingly, the Court’s analysis of this claim stops here because there are no material
20 issues of fact for the jury to resolve.

21 Defendants’ Motion for Summary Judgment as to Plaintiff’s Fourteen Amendment claim
22 is GRANTED.

23

3. Federal Qualified Immunity

2 While the Court has already concluded that Defendants did not violate Plaintiff's or
3 Ricardo's Fourth and Fourteenth Amendment rights, the Court nevertheless will address whether
4 Defendants are entitled to federal qualified immunity. Federal "qualified immunity protects
5 government officials 'from liability for civil damages insofar as their conduct does not violate
6 clearly established statutory or constitutional rights of which a reasonable [officer] would have
7 known.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Pearson v. Callahan*,
8 555 U.S. 223, 231 (2009)); *see also Ramirez v. City of Buena Park*, 560 F.3d 1012, 1020 (9th Cir.
9 2009) (finding that federal qualified immunity is "'an entitlement not to stand trial or face the other
10 burdens of litigation.'"). In *Pearson v. Callahan*, the Supreme Court, explained that a district court
11 must analyze whether a party is entitled to federal qualified immunity at the summary judgment
12 stage by determining, whether the facts alleged, taken in the light most favorable to the plaintiff,
13 show that an officer's conduct: a) violated a constitutional right; and b) the right at issue was
14 "clearly established" at the time of defendant's alleged misconduct. 555 U.S. 223 at 232.

15 The Supreme Court’s recent decision in *Kisela v. Hughes* is directly on point. 138 S. Ct.
16 1148 (2018). In *Kisela*, an officer responded to a 911 call in which the caller reported seeing a
17 woman acting erratically while holding a large kitchen knife. *Kisela*, 138 S. Ct. at 1151. Upon
18 arriving at the scene, the officers reported that they saw a woman emerge from her house carrying
19 a large kitchen knife at her side with the blade pointing backwards. *Id.* Close by, a bystander,
20 who the officers later learned was the woman’s roommate, was standing outside the house in the
21 vicinity of the driveway. *Id.* As the woman approached the bystander, the officers drew their guns
22 and instructed the woman to drop the knife. *Id.* The woman refused to comply with the
23 instructions. *Id.* As the woman continued to approach the bystander, the officer shot her. *Id.*

1 Plaintiff sustained non-life-threatening injuries. *Id.* As part of the investigation, there was
2 conflicting officer testimony as to whether the woman had raised the knife.

3 The plaintiff sued the officer, alleging that he violated her Fourth Amendment rights by
4 using excessive force when he shot her. *Id.* The officer moved for summary judgment, contending
5 among other defenses that he was entitled to qualified immunity because he neither violated a
6 clearly established right nor did he have reason to believe that the use of deadly force was a
7 violation of the plaintiff's civil rights. *Id.* The district court granted summary judgment to the
8 officer. *Id.* The plaintiff appealed, arguing that the trial court erred because there were material
9 issues in dispute as to whether the officer's use of force was lawful, thus precluding the issue of
10 federal qualified immunity. *Id.* On appeal, the Ninth Circuit reversed the district court's grant of
11 summary judgment, finding among other issues that the record, viewed in the light most favorable
12 to the plaintiff, was sufficient to demonstrate that the officer was not entitled to qualified immunity
13 because his actions had violated clearly established law in that jurisdiction. *Id.*

14 The Supreme Court granted *certiorari* and held that the officer was entitled to federal
15 qualified immunity because he had not used excessive force when he shot the plaintiff, citing to
16 the officer's subjective belief that the plaintiff was a threat to the bystander because she was not
17 only carrying a knife but according to the 911 call that dispatched the officer had been acting
18 erratically before the officers were dispatched through a 911 call. *Id.*

19 Taking the facts in the light most favorable to the Plaintiff, this Court found, *supra*, that
20 the officers did not violate Ricardo's constitutional rights. *See Kisela*, 138 S. Ct. at 1152
21 ("Immunity protects all but the plainly incompetent or those who knowingly violate the law."). As
22 the Supreme Court found in *Kisela*, this Court finds that the officers had a reasonable, subjective
23

1 belief that Ricardo was an imminent threat given that he was carrying multiple knives and had
2 been acting erratically according to the 911 call.

3 As such, Defendants' Motion for Summary Judgment is GRANTED as to Plaintiffs' claim
4 for federal qualified immunity.

5 **B. Plaintiff's State Law Claims**

6 Defendants also move for summary judgment on Plaintiff's state law claims for negligence,
7 outrage, assault, and discrimination under the Washington Law Against Discrimination
8 ("WLAD"), RCW § 49.60.030, et seq. Dkt. Nos. 30, 55. Plaintiffs object and argue that there are
9 several material disputes of fact that remain, precluding summary judgment at this stage. Dkt. No.
10 48. The Court will address each of these claims in turn.

11 1. Negligence

12 Ms. Hernandez contends that the responding officers were negligent when responding to
13 Ricardo's actions after her 911 call for two reasons: (1) she contends that a special relationship
14 existed between the officers and Ricardo once the officers told Ricardo to surrender to them, drop
15 his knives, and submit to arrest; and (2) the officers did not exercise reasonable care when dealing
16 with Ricardo, an individual experiencing a mental health episode. Dkt. No. 48 at 27–30.
17 According to Plaintiff, the officers should have foreseen that their arrival would escalate the
18 situation and should have summoned a crisis team to the scene. *Id.* at 30. She argues that the
19 Court should allow this claim to survive the summary judgment stage because a reasonable "jury
20 must decide whether it was foreseeable that officers of the Federal Way Police Department could
21 cause the situation to escalate and whether they knew or should have known that Ricardo was
22 experiencing a mental health episode and suicidal." *Id.* at 30:16–19.

1 “As a general rule, law enforcement activities are not reachable in negligence.” *McGregor*
 2 *v. Kitsap Cty.*, No. C17-5436, 2017 WL 6612012, at *2 (W.D. Wash. Dec. 27, 2017) (quoting
 3 *Keates v. City of Vancouver*, 869 P.2d 88, 93 (Wash. Ct. App. 1994)). The public duty doctrine
 4 recognizes that the duty of officers to provide protection is normally owed to the public at large
 5 and is unenforceable as to individual members of the public. *Thomas*, 2017 WL 2289081, at *14
 6 n.7; *see also Estate of Wasilchen v. Gohrman*, 870 F. Supp. 2d 1115, 1140 (W.D. Wash. 2012),
 7 *aff’d sub nom. Tubbs v. Gohrman*, 539 Fed. App’x 788 (9th Cir. 2013); *Vergeson v. Kitsap Cty.*,
 8 186 P.3d 1140, 1145 (Wash. Ct. App. 2008); *Beal for Martinez v. City of Seattle*, 954 P.2d 237
 9 (Wash. 1998). This is often referred to as the public duty doctrine. *Id.*

10 Washington courts have long recognized an exception to the public duty doctrine where a
 11 special relationship existed between the officers and the plaintiff. *Cummins v. Lewis Cty.*, 98 P.3d
 12 822, 825 (Wash. Ct. App. 2004), *aff’d*, 133 P.3d 458 (Wash. 2006). “An exception to the public
 13 duty doctrine provides that if a ‘special relationship’ exists between the public officer and the
 14 plaintiff, a duty owed to the individual may arise.” *McGregor*, 2017 WL 6612012, at *2 (quoting
 15 *Thomas*, 2017 WL 2289081, at *14 n.7). “To create a special relationship between police officer
 16 and citizen, Washington law requires direct contact setting the citizen apart from the general
 17 public, and ‘express assurances’ of assistance that give rise to a justifiable reliance on the part of
 18 the citizen.” *McGregor*, 2017 WL 6612012, at *2 (quoting *Beal*, 954 P.2d at 776–77).

19 Here, Plaintiff alleges that a special relationship existed between Ricardo and the officers
 20 because the officers were no longer treating Ricardo as a member of the general public. Dkt. No.
 21 48 at 30:6–8. Plaintiff further contends that officers gave Ricardo explicit assurances of protection
 22 “when they drew [their] guns and point[ed] them” at him so he could surrender and “attempt[] to
 23 comply with those commands.” *Id.* at 30:8–11.

1 Plaintiff's argument fails to persuade. There is no evidence whatsoever that Ricardo relied
 2 on any express assurances that he allegedly received from the officers. *See Torres v. City of*
 3 *Anacortes*, 981 P.2d 891, 897 (Wash. Ct. App. 1999) (quoting *Honcoop v. State*, 759 P.2d 1188,
 4 1194 (Wash. 1988)) ("In Washington, 'a governmental duty cannot arise from implied
 5 assurances.'"); *see also McGregor*, 2017 WL 6612012, at *2 (citing *Hamilton v. City of Olympia*,
 6 687 F. Supp. 2d 1231, 1248 (W.D. Wash. Sep. 8, 2009)) ("an actionable duty to provide police
 7 services will arise if . . . there are explicit assurances of protection that give rise to reliance on the
 8 part of the victim."). The record is devoid of any evidence that would allow the jury to find for
 9 Plaintiff on this claim. Thus, the Court finds Plaintiff has not raised any issues of material fact in
 10 support of her negligence claim predicated on a special relationship between the officers and
 11 Ricardo.

12 Next, the Court turns to Plaintiff's argument that responding officers were negligent
 13 because they did not use reasonable care when interacting with Ricardo even though they were
 14 aware he was going through a mental health crisis. Plaintiff alleges that the officers acted
 15 negligently towards Ricardo when they failed to use "de-escalation tactics" to defuse the situation.
 16 Dkt. No. 48 at 30. However, as stated above, Plaintiff must establish that a "special relationship"
 17 existed between Ricardo and the officers to maintain a negligence claim against Defendants.
 18 Plaintiff has failed to do so. As such, this claim must be dismissed. *See Washburn v. City of Fed.*
 19 *Way*, 310 P.3d 1275, 1289 (Wash. 2013).

20 Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's negligence
 21 claim is GRANTED.

22 2. Outrage

23 A claim for outrage requires a showing of "(1) extreme and outrageous conduct, (2)

1 intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe
2 emotional distress.” *Monetti v. City of Seattle*, 875 F. Supp. 2d 1221, 1231 (W.D. Wash. 2012)
3 (quoting *Dicomes v. State*, 782 P.2d 1002, 1012 (Wash. 1989)); Restatement (Second) of Torts §
4 46 (1965)). The conduct in question must be “so outrageous in character, and so extreme in degree,
5 as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly
6 intolerable in a civilized community.” *Estate of Lee ex rel. Lee v. City of Spokane*, 2 P.3d 979,
7 990 (Wash. Ct. App. 2000) (citing *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975)) (emphasis
8 omitted). The question of whether certain conduct is sufficiently outrageous is ordinarily for the
9 jury. *McClain v. City of Tacoma*, No. 06-cv-5016, 2007 WL 2495384, at *7 (W.D. Wash. Aug.
10 30, 2007) (citing *Birklid v. Boeing Co.*, 904 P.2d 278, 286 (Wash. 1995)). However, it is the trial
11 court’s responsibility to determine “whether reasonable minds could differ on whether the conduct
12 was sufficiently extreme to result in liability.” *Johnson v. City of Olympia*, No. 17-cv-5403, 2018
13 WL 4681554, at *2 (W.D. Wash. Sept. 28, 2018) (citing *Dicomes*, 782 P.2d at 1012). The standard
14 for whether conduct is considered “outrageous” is a high one: “[I]t is not enough that a ‘defendant
15 has acted with an intent which is tortious or even criminal, or that he has intended to inflict
16 emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of
17 aggravation which would entitle the plaintiff to punitive damages for another tort.” *Johnson*, 2018
18 WL 4681554, at *2 (citing *Grimsby*, 530 P.2d at 295); Restatement (Second) of Torts § 46 (1965).

19 No reasonable jury could find that the officers’ interactions with Ricardo or his family
20 approached the outrage threshold, based on the events set forth in this opinion. *See McClain*, 2007
21 WL 2495384, at *7 (holding that police officers who responded with deadly force to domestic
22 violence suspect when he opened door to his house and pointed rifle directly at officer’s chest after
23

1 being told to put if down did not commit tort of outrage against suspect or suspect's family
2 members).

3 Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's outrage claim is
4 GRANTED.

5 3. Assault

6 Plaintiff brings a claim for assault based on the officers' use of excessive force. Dkt. No.
7 48 at 27:14–17. This Court has already determined that Officers Losvar and Pau did not use
8 excessive force when they shot Ricardo. Therefore, Plaintiff's assault claim must be dismissed.

9 Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's assault claim is
10 GRANTED.

11 4. Discrimination

12 Ms. Hernandez brings a claim for discrimination under the Washington Law Against
13 Discrimination (“WLAD”), RCW § 49.60.030, et seq. Dkt. No. 48 at 30–32. She alleges the
14 officers discriminated against Ricardo because he was having a mental health episode and because
15 he was Latino. *Id.* The officers move for summary judgment, asserting there are no material
16 factual disputes as to whether their actions were discriminatory. Dkt. No. 30 at 30–31. The WLAD
17 states that every individual has a right to be free from discrimination based on, among other things,
18 race, creed, color, national origin, and mental disability. RCW 49.60.030.

19 The Court finds that Plaintiff provides no factual evidence—whatever—to support her
20 claim that the officers took any action due to Ricardo's Latino ethnicity or any potential mental
21 disability. *Frisino v. Seattle Sch. Dist. No. 1*, 249 P.3d 1044, 1048 (Wash. Ct. App. 2011) (holding
22 that an adverse party may not rest upon mere allegations or denials but must instead set forth
23

1 specific facts showing the existence of a genuine issue for trial). Ms. Hernandez has not carried
2 her burden of demonstrating that there exist material disputed facts for the jury to decide.

3 Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's discrimination
4 claim is GRANTED.

5 **III. CONCLUSION**

6 For the foregoing reasons, the Court rules as follows:

- 7 1. Defendant City of Federal Way's Motion for Summary Judgment is GRANTED on
8 Plaintiff's municipal liability claim;
- 9 2. Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's Fourth and
10 Fourteenth Amendment claims;
- 11 3. Defendant Officers Losvar's and Pau's Motion for Summary Judgment is GRANTED
12 on their claims for federal and state qualified immunity;
- 13 4. Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's state law
14 claims; more particularly, her claims of negligence, outrage, assault, and
15 discrimination.

16 The Court having GRANTED Summary Judgment on all of Plaintiff's claims and having
17 found that Officers Losvar and Pau are entitled to qualified immunity under both federal and state
18 law, this action is hereby DISMISSED.

19 **IT IS SO ORDERED.**

20 DATED this 24th day of April, 2020.



21
22 BARBARA J. ROTHSTEIN
23 UNITED STATES DISTRICT JUDGE